No. 08-1596

Supreme Court, U.S.
FILED
JUL 22 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TRACY RHINE,

Petitioner,

v.

CARL DEATON, et ux.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEAN M. SWANDA
SWANDA & SWANDA, P.C.
109 E. Park Row Drive
Arlington, Texas 76010
(817) 467-4668

Counsel for Respondents
Carl and Yolanda Deaton

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The Deatons have one correction to make to Ms. Rhine's "Parties to the Proceeding." Ms. Rhine identifies the Deatons as J.C.'s adoptive parents. The Deatons have not adopted J.C. and will not initiate adoption proceedings until these proceedings are over. Technically the Deatons are J.C.'s managing conservator. (CR 56.)

Regarding the identification of the parties by initials or aliases, section 109.002(d) of the Texas Family Code provides: "On motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only." Tex. Fam. Code § 109.002(d). The Fort Worth Court of Appeals used this provision in its opinion. *In re J.C.*, 250 S.W.3d 486, 487 n.1 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending). There was no comparable provision for briefs, motions, and other papers filed with the court. Effective September 1, 2008, rule 9.8 of the Texas Rules of Appellate Procedure requires the parties to use initials or fictitious names for minors in all papers submitted to the court, including all appendix items. The only exception is the docketing statement. Additionally, if the court orders it, the parties are to use initials or fictitious names for a minor's parent or other family members if doing so is necessary to protect a minor's identity. TEX. R.

PARTIES TO THE PROCEEDING – Continued

APP. P. 9.8. The Deatons agree with Ms. Rhine that at this juncture there is no point in not using the parties names – at least in the briefs.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	iii
Table of Authorities	v
Cases	v
Statutes	vi
Rules	vii
References to the Record	1
Summary of the Arguments	2
Reasons for Denying the Writ	4
(1) Ms. Rhine preserved none of her complaints; (2) the results are sufficiently reliable; and (3) Ms. Rhine has not shown counsel would have made a determinative difference	4
(1) Ms. Rhine preserved none of her complaints	4
(2) The results are sufficiently reliable	9
(3) Ms. Rhine has not shown counsel would have made a determinative difference	9
What Happened in Dallas County	10
How the Case Ended Up in Tarrant County	16
Regarding the Appointment of an Attorney for J.C.	19

TABLE OF CONTENTS – Continued

Page

Regarding the Appointment of an Attorney for the Missing Father 21

Regarding the Possible Appointment of Counsel to Ms. Rhine 23

What Happened in Tarrant County 27

Regarding the Possible Appointment of Appellate Counsel 28

Regarding the Reporter's Record 29

Final Comments 31

The Attorney General of the State of Texas 33

Conclusion 34

Appendix

Appendix A – The April 17, 2007, letter from the Fort Worth Court of Appeals to Ms. Rhine regarding the Reporter's Record ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

B.L.D., In re, 113 S.W.3d 340 (Tex. 2003), *cert. denied*, 541 U.S. 945, 124 S. Ct. 1674, 158 L. Ed. 2d 371 (2004) 7, 8, 9

D.D.M., In re, 116 S.W.3d 224 (Tex. App. – Tyler 2003, no pet.) 13

Dreyer v. Greene, 871 S.W.2d 697 (Tex. 1993) 7

Exxon Shipping Co. v. Baker, ___ U.S. ___, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) 6, 9

J.C., In re, 250 S.W.3d 486 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending) ..... i, 5, 27, 29

Lassiter v. Department of Social Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) 8, 9

L.J.S., In re, 96 S.W.3d 692 (Tex. App. – Amarillo 2003, pet. denied) 13

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 8

R.R., In re, 209 S.W.3d 112 (Tex. 2006) 30

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) 7

Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) 6, 9

TABLE OF AUTHORITIES – Continued

Page

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) 7

Yee v. City of Escondido, Cal., 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) 7, 9

STATUTES

TEX. FAM. CODE § 103.001(a) 17

TEX. FAM. CODE § 107.001(2) 21, 23

TEX. FAM. CODE § 107.003 21

TEX. FAM. CODE § 107.004 21

TEX. FAM. CODE § 107.011 19

TEX. FAM. CODE § 107.012 19

TEX. FAM. CODE § 107.013(a)(2) 22

TEX. FAM. CODE § 107.015 ..... 25, 26

TEX. FAM. CODE § 107.015(c) 14, 26

TEX. FAM. CODE § 107.021 20

TEX. FAM. CODE § 107.021(a) 24

TEX. FAM. CODE § 107.021(a-1) 20, 24

TEX. FAM. CODE § 107.021(b) 25

TEX. FAM. CODE § 107.022 ..... 26, 27

TEX. FAM. CODE § 107.023 27

TEX. FAM. CODE § 107.023(c) 27

TEX. FAM. CODE § 109.002(d) i

TEX. FAM. CODE § 161.002(e) 22

TABLE OF AUTHORITIES – Continued

Page

TEX. FAM. CODE § 263.401(a) 10

TEX. FAM. CODE § 263.401(b) 10, 12

TEX. FAM. CODE § 263.401(c) 12, 13, 14

RULES

TEX. R. APP. P. 9.8 ..... i, ii

TEX. R. APP. P. 20.1(k) 5

TEX. R. APP. P. 49 29

TEX. R. APP. P. 320 28

No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,

Petitioner,

v.

CARL DEATON, et ux.,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Texas
Second District

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES, respondents, Carl and Yolanda Deaton, respectfully present this "Brief in Opposition to the Petition for Writ of Certiorari."

REFERENCES TO THE RECORD

The Deatons maintain the nomenclature used for the record in Texas. For court documents, such as petitions, motions, orders, and the judgment, the record is referred to as the "Clerk's Record." There

was a "Clerk's Record," which the Deatons will refer to as "(CR page number)." There was also an "Abatement Hearing Supplemental Clerk's Record," which the Deatons will refer to as "(CR Supp. page number)." The transcription of the testimony at trial and at any hearings is referred to as the "Reporter's Record." There was no transcription of the trial. There is a transcription of an abatement hearing. An appellate court clerk apparently handwrote the word "Supplemental" to the caption of the Reporter's Record ostensibly because the transcription of the abatement hearing was filed after the transcription of the trial testimony normally would have been filed. As it is the only transcription, the Deatons refer to it simply as "(RR page number)."

SUMMARY OF THE ARGUMENTS

Ms. Rhine preserved none of the issues she presents for review. She has not shown she raised them in the trial court (while pro se), she did not raise them in the court of appeals (while pro se), or in her petition for review filed in the Supreme Court of Texas (while pro se). She raised all of her issues for the first time in her "Brief on the Merits" (with the aid of counsel) in the Supreme Court of Texas. As recently as 2003, the Supreme Court of Texas wrote an opinion addressing when appellate courts may address unpreserved claims in termination proceedings. The Supreme Court of Texas is sensitive to this issue. After the Supreme Court of Texas reviewed the

briefs on the merits as well as a reply brief in this case, it declined to review the unpreserved complaints. The Supreme Court of the United States has written that whether a court of appeals chooses to address unpreserved issues is a matter of appellate court discretion. The Supreme Court of the United States has also written that when a party raises a constitutional claim for the first time in a state supreme court, and when the state supreme court denies discretionary review, it will, "with very rare exceptions," refuse to consider the party's claim. The Deatons ask this Court to respect the discretion exercised by the Supreme Court of Texas. Although Ms. Rhine raises troubling concerns about Texas procedures, this is not the proper case to resolve those issues. Resolving them will only destabilize J.C.'s life for years to come, and Ms. Rhine will never be able to persuade a court to return J.C. to her – even with the assistance of counsel. The proper place to resolve these issues is in the Texas legislature. This case provides a concrete example of how the Texas procedures work and what their implications are. This case has drawn the attention of prominent attorneys who can articulate their concerns to the Texas legislature. Destabilizing J.C.'s life for potentially years to come to address these concerns is not justified where Ms. Rhine is fighting a hopeless cause on the termination issue.

The Deatons further contend the results are sufficiently reliable. Ms. Rhine has not shown the presence of counsel could have made a determinative

difference. Ms. Rhine led an unstable and dangerous life, apparently without recognizing her own instability and without recognizing the dangers with which she tempted fate. Ms. Rhine, in turn, has destabilized her daughter's life for nearly five years now. The Deatons are not part of the problem. They are part of the solution. In characteristic self-defeating fashion, Ms. Rhine is attempting to knock out the only source of stability her daughter has ever known.

REASONS FOR DENYING THE WRIT

(1) Ms. Rhine preserved none of her complaints; (2) the results are sufficiently reliable; and (3) Ms. Rhine has not shown counsel would have made a determinative difference.

(1) Ms. Rhine preserved none of her complaints.

Ms. Rhine did not preserve any of her issues. There is no transcription of the trial. They were not raised in her motion for new trial. (CR 60.) She did not raise them in her amended brief in the Fort Worth Court of Appeals. (Ms. Rhine's "Amended Brief" was tendered 6-11-07 and officially filed 8-27-07.) She did not raise them at the June 25, 2007, abatement hearing, the purpose of which was to determine whether she should be appointed appellate counsel. (CR Supp. 2 (6-8-08 order regarding appointment of appellate counsel).) (RR 10-11.) She did not raise them in her petition for review to the Supreme

Court of Texas. (6-16-08 Tx. S. Ct. "Petition for Review" *passim*.)

Regarding the absence of a transcription of the trial (the Reporter's Record), as the opinion of the Fort Worth Court of Appeals noted, Ms. Rhine never complained. *In re J.C.*, 250 S.W.3d 486, 488 n.3 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending). In an April 17, 2007, letter from the Fort Worth Court of Appeals to Ms. Rhine, the court warned Ms. Rhine that the court reporter had informed it that Ms. Rhine had neither requested nor made arrangements to pay for the Reporter's Record and that if she did not request the Reporter's Record and make payment arrangements, the appeal would proceed without a Reporter's Record. (4-17-07 letter attached as Appendix A.) Even assuming Ms. Rhine lacked the sophistication to prosecute an appeal pro se, the letter from the Fort Worth Court of Appeals was designed to alert her to problems and even provided her the information she needed to address them. Ms. Rhine did not take advantage of the court's letter.

Regarding payment for the Reporter's Record, indigence is not necessarily an all-or-nothing proposition. The trial court had the authority to order a partial payment of costs. Tex. R. App. P. 20.1(k). The trial court's order effectively found Ms. Rhine indigent for purposes of paying the filing fees and for paying for the Clerk's Record. (CR 64.) In Ms. Rhine's pro se "Petition for Review" before the Supreme Court of Texas, she stated, "And due to the records being

sealed by the time [she] had the funds necessary she could not obtain the reporter[']s record." (6-16-08 Tx. Sup. Ct. "Petition for Review" p. 10.) The trial court ordered the records sealed on March 7, 2007. (CR 63.) In other words, Ms. Rhine admitted having the funds necessary to pay for the Reporter's Record some time after March 7, 2007. This is one month before the April 17, 2007, letter from the Fort Worth Court of Appeals informing her she needed to request the Reporter's Record and make arrangements to pay for it, two months before she filed her original May 30, 2007, brief, and three months before she tendered her amended brief on June 11, 2007. The Fort Worth Court of Appeals waited until August 27, 2007, to order her amended brief filed. The Fort Worth Court of Appeals was ostensibly waiting to see if Ms. Rhine would file the Reporter's Record late. A catty assessment of this situation is that Ms. Rhine had no compunctions about spending other people's money fighting the termination but retained reservations about spending her own. Another possible inference is Ms. Rhine did not want the Fort Worth Court of Appeals to review the Reporter's Record. Whether intended or not, Ms. Rhine has gotten far more sympathy and leverage from the absence of the Reporter's Record.

As a general rule, appellate courts do not address issues not preserved at trial. *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2618, 171 L. Ed. 2d 570 (2008); *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). Texas

plays by the same rules. *In re B.L.D.*, 113 S.W.3d 340, 354-55 (Tex. 2003), *cert. denied*, 541 U.S. 945, 124 S. Ct. 1674, 158 L. Ed. 2d 371 (2004); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (equal protection and due process). Ms. Rhine's complaints were not preserved.

When a party does not raise a constitutional claim in the trial court or in the court of appeals but waits to raise it for the first time in the state supreme court, and when the state supreme court denies discretionary review, this Court has written that the state supreme court has effectively expressed no view on the merits. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). The party has effectively raised no substantive constitutional claim in the state courts, and it is left with no state court having addressed its claim. *Yee*, 503 U.S. at 533. With very rare exceptions, this Court has refused to consider claims that were neither raised nor addressed in the state courts. *Yee*, 503 U.S. at 533.

As recently as 2003, the Supreme Court of Texas addressed whether due process required appellate review of certain unpreserved complaints in parental rights termination cases. *B.L.D.*, 113 S.W.3d at 351-52. The Supreme Court of Texas did not categorically prohibit review of unpreserved error but looked at a number of factors. *B.L.D.*, 113 S.W.3d at 352-54. The court relied on such United States Supreme Court precedents as *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v.*

Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); and *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *B.L.D.*, 113 S.W.3d at 352-55. The court looked at such factors as whether the unpreserved error might result in a reversal of a judgment to terminate, whether the unpreserved error bore on the accuracy of the verdict, the state's strong interest in ensuring trial courts have the first opportunity to correct errors as a matter of judicial economy, the concern for preventing children's lives from remaining in legal limbo, and the risk the unpreserved complaints would cause a parent to be erroneously deprived of her children. *B.L.D.*, 113 S.W.3d at 352-53. Accordingly, the Supreme Court of Texas was keenly sensitive to the issues Ms. Rhine sought to present notwithstanding the fact Ms. Rhine had not preserved any of them. The Supreme Court of Texas on August 25, 2008, specifically referred the matter to the State Bar of Texas Appellate Section's Pro Bono Committee so that Ms. Rhine could obtain counsel pro bono. Ms. Rhine obtained a well-respected attorney. The Supreme Court of Texas asked for and got briefs on the merits from both parties while both were represented by counsel. Ms. Rhine's pro bono counsel even filed a reply brief on January 6, 2009. After reviewing the briefs on the merits and the reply brief, the Supreme Court of Texas declined to hear the case.

At least in the context of federal appellate courts, this Court recognized whether an appellate court deviates from the preservation-of-error requirement is a matter left primarily to the discretion of the appellate courts, to be exercised on the facts of the individual cases. *Exxon Shipping Co.*, 128 S. Ct. at 2618; *Singleton*, 428 U.S. at 121. Although the Supreme Court of Texas did not issue an opinion, it denied the petition for review after reviewing the briefs on the merits and a reply brief. The *B.L.D.* opinion out of the Supreme Court of Texas shows it would have denied the petition only after serious consideration. According to *Yee*, when a state supreme court denies discretionary review, as the Supreme Court of Texas did here, the constitutional claims have effectively never been raised or addressed in the state courts, and, "with very rare exceptions," this Court refuses to consider such claims. *Yee*, 503 U.S. at 533. The Deatons respectfully ask this Court to abide by the decision of the Supreme Court of Texas not to review this case.

(2) The results are sufficiently reliable.

(3) Ms. Rhine has not shown counsel would have made a determinative difference.

When determining whether the failure to appoint counsel resulted in a due process violation, this Court looked at whether the presence of counsel could have made a determinative difference. *Lassiter*, 452 U.S. at 32-33. The Deatons contend that, even on this record,

the results are sufficiently reliable and that the presence of counsel could not have made a determinative difference.

What Happened in Dallas County

J.C. was born August 10, 2004, and on August 16, 2004, in Dallas County, the Department of Family and Protective Services (the Department) removed J.C. because she tested positive for cocaine and PCP. (CR 8.) Ms. Rhine either fought the removal and lost or conceded the removal was proper. Regardless, the case remained alive in Dallas County for approximately another year and a half. (CR 8.) Here is the first indication of reliability: Ms. Rhine gave birth to a child who tested positive for drugs, the Department removed J.C., and the case remained open.

In Texas, when the government (here the Department) removes a child and seeks termination, it has a one-year deadline to resolve the case or return the child. TEX. FAM. CODE § 263.401(a). With a removal on August 16, 2004, the first deadline was the first Monday after the first anniversary of the appointment of the Department as temporary managing conservator. TEX. FAM. CODE § 263.401(a). This would have placed the first dismissal date on or about August 16, 2005.

The one-year dismissal deadline is not a hard deadline. A 180-day extension is possible. TEX. FAM. CODE § 263.401(b). That would have pushed the dismissal deadline to February 12, 2006, or thereabouts.

The record suggests there was a 180-day extension in the Dallas County suit because the suit continued after August 2005. (CR 8.) The extension suggests two things: (1) Ms. Rhine had not persuaded the Department or the trial court to return J.C. to her after one year, and (2) the Department was willing to work with Ms. Rhine another six months. Here is another indication of reliability. Ms. Rhine had eighteen months to get her child back with the assistance of counsel. Notwithstanding the eighteen months, and notwithstanding the assistance of counsel, she failed to persuade the Department or the trial court to return her child to her.

The Department and Ms. Rhine entered a mediated agreement. (CR 8.) We do not know the substance of the mediated agreement because it is not part of the record. On page 3 of the petition, Ms. Rhine asserts the agreement was "binding and irrevocable." (Pet. p. 3.) Because the mediation agreement is not in the record, there is no basis for using quotations. The mediation agreement might well have contained that language, but there is no way to know on this record. Ms. Rhine contends if she performed certain tasks, the Department agreed to return J.C. to her. (Pet. p. 3.) The converse was true as well. If she failed to perform those tasks, the Department could terminate her parental rights in an expedited manner. Ms. Rhine executed an affidavit of relinquishment that J.C.'s guardian ad litem held and which the Department could use if Ms. Rhine fell short of complying with her assigned tasks. (CR 8.)

When the Department presented to the judge their mediated agreement for enforcement on January 11, 2006, the Dallas trial court failed to make any findings or rulings. (CR 8.) Ostensibly the trial judge was not willing to either terminate or return J.C. based upon whether Ms. Rhine had or had not jumped through certain hoops. Apparently the trial judge wanted the termination resolved at trial pursuant to the relevant statutes. Here is another indication of reliability. The trial court was not willing to resolve J.C.'s fate summarily pursuant to the mediation agreement.

On page 4 of the petition, Ms. Rhine asserts that the Department apparently thought better of the settlement agreement and, implicitly, tried to circumvent it. (Pet. p. 4.) The Deatons contend the record does not support this. The Deatons' understanding is the Department was attempting to terminate Ms. Rhine's parental rights pursuant to the settlement agreement and Ms. Rhine was simultaneously trying to have J.C. returned to her for the same reasons. (CR 8.) Ms. Rhine apparently perjured herself in an attempt to show compliance with the conditions of the mediated settlement agreement. (CR 8.) From the Deatons' perspective, Ms. Rhine dodged a bullet when the trial court refused to enforce the settlement agreement.

By this time (January 11, 2006), the Department was fast coming upon its eighteen-month mandatory statutory dismissal deadline (around February 12, 2006). (CR 8.) TEX. FAM. CODE § 263.401(b), (c). It is

not clear whether the Department was unable to obtain a trial date on such short notice. If one of the parties had requested a jury trial, this presumably would have made obtaining a trial date that much more difficult.

In any event, the Department was facing an imminent involuntary dismissal. TEX. FAM. CODE § 263.401(c). The Department could potentially refile a petition after the dismissal, provided it had new facts. *In re L.J.S.*, 96 S.W.3d 692, 694 (Tex. App. – Amarillo 2003, pet. denied). In other words, the Department could have dismissed its case (or had its case dismissed involuntarily), could have returned J.C. to Ms. Rhine, and thereafter could have initiated a new removal and refiled a new case – provided it was willing to play Russian roulette with J.C.'s safety.

On January 19, 2006, eight days after the Department and Ms. Rhine's attempt to implement the mediated settlement agreement failed, the Deatons, J.C.'s foster parents, intervened in the Dallas County suit, but the Dallas trial court struck their intervention. (CR 8.) Had the Dallas trial court not stricken the Deatons' intervention, the case would have proceeded in Dallas County. *In re D.D.M.*, 116 S.W.3d 224, 231-32 (Tex. App. – Tyler 2003, no pet.). If the case did not remain in Dallas County, it was not through lack of effort on the part of the Deatons. They tried.

If the Deatons had succeeded in intervening in Dallas County, there is no statutory mandatory

dismissal deadline for private terminations. If the Deatons had succeeded in intervening in Dallas County, the Department would have dropped out when its mandatory dismissal deadline ran out on or about February 12, 2006. If the Deatons had succeeded in intervening in Dallas County, and if the Department's suit was dismissed, as it should have been under section 263.401(c) of the Texas Family Code, the question of whether Ms. Rhine was entitled to appointed counsel at the county's expense would have arisen again. Ms. Rhine had appointed counsel at the county's expense only by virtue of the Department's having brought the termination proceeding. TEX. FAM. CODE § 263.401(c). The Department would have no longer been a party to the suit. The trial court was statutorily prohibited from using county or state funds to pay for Ms. Rhine's attorney in a private termination proceeding. TEX. FAM. CODE § 107.015(c). If Ms. Rhine continued with court appointed counsel paid for by the county, it would have been only through oversight. Trial courts have budgets too, and the odds of the trial court missing an opportunity to take an attorney off the county payroll were minute. Consequently, the subsequent switch to Tarrant County (the "coordinated maneuver") changed only the location of where the decision whether to appoint counsel was made once the termination proceeding became private. To the extent Ms. Rhine was under the impression she would have necessarily kept her counsel if the case had remained in Dallas County, that is not true. It is false.

On page 12 of the petition, Ms. Rhine asserts the "coordinated maneuver" was chicanery and a conspiracy to deprive Ms. Rhine of counsel. (Pet. p. 12.) As explained above, this is inaccurate. If the Deatons had successfully intervened in Dallas County, once the Department was statutorily forced out of the suit, the question of appointed counsel would have resurfaced. Additionally, foster parents, such as the Deatons here, take enormous financial risks by pursuing a private termination proceeding when the Department will soon be dismissed from the suit. As will be shown below, the trial court in Tarrant County could have appointed counsel to Ms. Rhine at the Deatons' expense. To protect J.C., the Deatons took a tremendous financial risk – not to mention a tremendous emotional commitment – when they could have very easily done nothing and blamed the Department when J.C. was returned to Ms. Rhine and subsequently neglected or abused. The danger under the current statutes is not that foster parents and the Department will conspire to deprive parents of counsel. The danger here is the Department may initiate termination proceedings only to later dump them on private parties and, in this manner, spare the state the financial expense and the Department the trouble of prosecuting the matter to its conclusion. Given the financial exposure, and given the allegations of bad faith, villainy, and baby-stealing that inevitably come with foster parent interventions, it is fair to say foster parents undertake private termination proceedings only if they genuinely fear for a child's safety. The foster parents

are, after all, the only people who actually live with the child on a day-to-day basis. It is one thing to take a calculated risk with a child you do not know. It is another thing to watch someone else take a calculated risk with a child you know and love.

How the Case Ended Up in Tarrant County

At this juncture, knowing the Deatons were willing to intervene, the Department was no longer left with the prospect of playing Russian roulette with J.C.'s safety. Instead, the Department was left with the prospect of a private termination proceeding picking up where its own suit had ended. The Deatons too had to make a choice. If they did nothing, the Department's case would get dismissed, and J.C. would be returned to Ms. Rhine. Absent concerns for J.C.'s safety in Ms. Rhine's care, this option would have been acceptable. That is what foster parents do. But there were serious concerns. (CR 8-10.) The Deatons opted not to abandon J.C. to her fate.

The Department was in a position to render the Deatons powerless. The Department could have returned J.C. to Ms. Rhine and dismissed its suit. Because the Dallas trial court struck the Deatons' petition in intervention, the Deatons would have been helpless to prevent that. The Department, however, chose a different path. The Department's decision speaks volumes about its assessment of the case. The Department coordinated the dismissal of its suit with the subsequent filing of the Deatons' private

termination proceeding in Tarrant County, which was where the Deatons and J.C. lived. This is the "coordinated maneuver" about which the Fort Worth Court of Appeals and Ms. Rhine speak. This too weighs in favor of reliability, because the Department could have facilitated the return of J.C. to Ms. Rhine but chose not to. Ms. Rhine would attribute this to spite. The Deatons would attribute this to a genuine concern for J.C.'s safety.

The "coordinated maneuver" looks underhanded and outcome determinative. It was neither. Once the Department dismissed its suit, the only county in which the Deatons could have filed their suit was in Tarrant County. The Deatons had to file their suit in the county in which J.C. resided, and the Deatons and J.C. lived in Tarrant County. TEX. FAM. CODE § 103.001(a). As noted earlier, if the Deatons had successfully intervened in the Dallas County suit, the question of whether Ms. Rhine should have appointed counsel and at whose expense would have arisen once the Department's case was dismissed. Filing the suit in Tarrant County changed nothing regarding the gaining or losing of her appointed counsel. Filing the suit in Tarrant County and the simultaneous loss of her appointed attorney gave Ms. Rhine the false impression the filing of the petition in Tarrant County was done for the purpose of depriving her of appointed counsel. The Tarrant County judge might have appointed counsel to Ms. Rhine. No one knew. The "coordinated maneuver" should not count against the reliability of the result. The "coordinated

maneuver" ensured that J.C. was not returned to Ms. Rhine through procedural default and ensured a judge made a decision based on the merits of the case. The Deatons and the Department made no attempt to conceal or camouflage the "coordinated maneuver." It was a legitimate legal maneuver. The purpose was to protect J.C. It was a legitimate legal maneuver that worked.

The Deatons' petition in Tarrant County offers the first glimpse showing what motivated them initially to try to intervene in the Dallas County suit and to later file an original petition in Tarrant County. Ms. Rhine had serious issues that translated into instability and danger for J.C. We do not have a transcription of the trial, but we do have the affidavit supporting the Deatons' petition to terminate. Presumably this is precisely where the evidence went at trial. The Deatons present these allegations not to denigrate Ms. Rhine. The Deatons present these allegations to show why they feared for J.C.'s safety.

J.C. was born positive for cocaine and PCP. (CR 8.) Ms. Rhine provided no prenatal care. (CR 9.) After giving birth to J.C., Ms. Rhine gave both the hospital and the Department a false name. (CR 8.) Ms. Rhine had provided incorrect information about the identity of J.C.'s birth father. (CR 8.) Ms. Rhine had convictions for forgery, identity theft, failure to identify, and fraud. (CR 8.) Ms. Rhine engaged in physical altercations and made violent threats. Whataburger terminated her because of a physical altercation with another employee. (CR 8.) Griff Hamburgers

similarly terminated Ms. Rhine because of a physical altercation with another employee. (CR 8.) Ms. Rhine, in a letter to J.C., said she would do her best to kill J.C.'s birth father if Ms. Rhine were not in jail. (CR 9.) Ms. Rhine admitted to the first foster parent that she smoked marijuana while pregnant. (CR 9.) Ms. Rhine tested positive for PCP when J.C. was born. (CR 9.) Two months after Ms. Rhine gave birth to J.C., Ms. Rhine was convicted for driving while intoxicated. (CR 9.) J.C. was born premature. (CR 9.) J.C. required physical therapy. (CR 9.) J.C. did not start walking until she was sixteen months old. (CR 9.) J.C. was speech delayed and was scheduled to receive speech therapy. (CR 9.) The Deatons were not going to return this child to Ms. Rhine without first having a court review the case. J.C. needed a safe, dependable, and permanent home. The Deatons could provide a safe, dependable, and permanent home. Here are more indications of reliability. The allegations were far more serious than a failure to occasionally change a diaper.

Regarding the Appointment of an Attorney for J.C.

The Deatons, in their February 3, 2006, "Original Petition" in Tarrant County, specifically asked the trial court to appoint an attorney/guardian ad litem for J.C. (CR 7.) The appointment of a guardian ad litem and an attorney ad litem for J.C. is mandatory in a termination suit brought by a governmental entity. TEX. FAM. CODE §§ 107.011, 107.012. In a

private termination, the trial court retains a sliver of discretion. TEX. FAM. CODE § 107.021. Specifically, the Texas Family Code provides:

> (a-1) In a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint one of the following:
>
> (1) an amicus attorney; or
>
> (2) an attorney ad litem.

TEX. FAM. CODE § 107.021(a-1). The Deatons specifically wanted J.C. to have a separate voice, and the trial court agreed. The court appointed an attorney/guardian ad litem for J.C., and J.C.'s attorney/guardian ad litem filed an answer on her behalf. (CR 28.) Here is another indication of reliability. Someone other than the Deatons had an attorney and a voice speaking specifically on behalf of J.C. J.C.'s attorney ad litem was free to side with Ms. Rhine if the facts warranted it.

The trial court's January 7, 2007, judgment shows the trial court ordered the Deatons to pay the attorney's fees for J.C.'s attorney/guardian ad litem in the amount of $5,566.25. (CR 56.) Not once in all these proceedings has the attorney ad litem spoken up to protest the termination. If the attorney ad litem disagreed with the result, she was in a position to

fight it. She did not. Here is another indication of reliability.

One can cynically suggest the attorney ad litem for J.C. was paid for by the Deatons and would, therefore, side with them. That argument could be used as well when the state pays for the child's attorney ad litem when the Department sues for termination. The attorney ad litem owes her client undivided loyalty. TEX. FAM. CODE § 107.001(2). Sections 107.003 and 107.004 of the Texas Family Code set out the duties of an attorney ad litem for a child. TEX. FAM. CODE §§ 107.003-.004. Needless to say, selling the child's interests out to the party paying the attorney's fees is not listed as one of those duties. As shown below, if the trial court had appointed an attorney to Ms. Rhine, the Deatons would have been the ones paying for her as well. That the Deatons paid for the services of J.C.'s attorney ad litem does nothing to undermine the reliability of the process.

Regarding the Appointment of an Attorney for the Missing Father

The Deatons did not request the appointment of counsel for Ms. Rhine or J.C.'s alleged birth father. The alleged birth father identified in the Deatons' petition was the third name given by Ms. Rhine. (CR 8.) Ms. Rhine apparently voluntarily abandoned the name of the first alleged birth father, and DNA

proved Ms. Rhine's second alleged birth father was not J.C.'s actual father. (CR 8.)

Ms. Rhine, in her "Brief on the Merits" in the Supreme Court of Texas, noted the trial court appointed counsel to represent the alleged birth father but did not appoint counsel to represent her. (Tx. S. Ct. BOM, pp. 3-4.) The alleged birth father was cited by publication, and the trial court appointed an attorney to help locate him. The alleged birth father's appointed attorney filed an answer in which he informed the court the alleged birth father's location was still unknown. (CR 46.) In a termination suit brought by "a governmental entity," appointment of counsel to a parent served by citation by publication is mandatory. TEX. FAM. CODE § 107.013(a)(2). Although this termination suit was not brought by "a governmental entity," the trial court appears to have appointed counsel to the alleged birth father because the appointment of counsel to a missing father under these circumstances was implied as mandatory. TEX. FAM. CODE § 161.002(e) (when alleged birth father has not registered with the paternity registry, when his location is unknown, and when he is cited by publication, statute assumes father has attorney ad litem who has exercised due diligence in attempting to identify and locate the alleged father). (Effective September 1, 2007, this language was deleted from section 161.002(e). 80th Leg., R.S., (2007), H.B. 3997.) In any event, no one complained. The judgment also shows the Deatons were ordered to pay the attorney's

fees for the alleged father's appointed attorney in the amount of $1,200. (CR 56.) That the Deatons paid for the birth father's attorney does nothing to undermine the reliability of the proceedings.

Regarding the Possible Appointment of Counsel to Ms. Rhine

Regarding the possible appointment of counsel for Ms. Rhine, section 107.001(2) of the Texas Family Code provides: "'Attorney ad litem' means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." TEX. FAM. CODE § 107.001(2). When the code refers to an "attorney ad litem," it is not limiting that term strictly to attorneys representing children. This provision was apparently included to ensure the definition was sufficiently broad to include attorneys representing children.

Section 107.021 provides:

DISCRETIONARY APPOINTMENTS

(a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following:

> (1) an amicus attorney;
>
> (2) an attorney ad litem; or
>
> (3) a guardian ad litem.

TEX. FAM. CODE § 107.021(a). The unrestricted reference to the appointment of an attorney ad litem is broad enough to encompass the appointment of counsel for a parent. Additionally, section 107.021(a-1), which was quoted earlier, specifically addresses the appointment of counsel for children, so section 107.021(a) would appear to apply to appointments to persons other than children. TEX. FAM. CODE § 107.021(a-1). The Deatons conclude the Texas Family Code contemplates the appointment of counsel for parents in private termination proceedings.

Section 107.021 thereafter provides:

> (b) In determining whether to make an appointment under this section, the court:
>
> (1) shall:
>
> (A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and
>
> (B) balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment;

> (2) may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child; unless the appointment is otherwise required by this code; and
>
> (3) may not require a person appointed under this section to serve without reasonable compensation for the services rendered by the person.

TEX. FAM. CODE § 107.021(b). These provisions contemplate the appointment of counsel for one party at another party's expense.

Section 107.015 provides:

> ATTORNEY FEES
>
> (a) An attorney appointed under this chapter to serve as an attorney ad litem for a child, an attorney in the dual role, *or an attorney ad litem for a parent* is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent.
>
> (b) [Discussion of payment of fees for child's attorney.]
>
> (c) If indigency of the parents is shown, an attorney ad litem appointed to represent a child or parent in a suit filed by a governmental entity shall be paid from the general funds of the county according to the fee schedule that applies to an attorney appointed to represent a child in a suit under

> Title 3 as provided by Chapter 51. *The court may not award attorney ad litem fees under this chapter against the state, a state agency, or a political subdivision of the state except as provided by this subsection.*

TEX. FAM. CODE § 107.015 (emphasis added). The italicized portion of subsection (a) is sufficiently broad to encompass the appointment of counsel to an indigent parent in a private termination proceeding. The italicized portion of subsection (c) expressly prohibits the award of attorney's fees against the state or its subsidiaries except in suits "filed by a governmental entity." Any award of attorney's fees in a private termination proceeding would necessarily have to come from one of the other parties.

Taking these statutes collectively, the Texas statutes do not prohibit the appointment of counsel to indigent parents in private termination proceedings. They do prohibit the appointment of counsel at the state's or county's expense. They appear to authorize the appointment of counsel at the expense of some other party to the suit. In short, if the trial court had appointed Ms. Rhine counsel, it could have done so only if it ordered the Deatons to pay for her attorney. The Deatons would have had to finance the prosecution of their suit. The Deatons would have also had to finance the defense against the prosecution of their suit. Such an order might have made the costs of the suit prohibitive to the Deatons.

Two other statutes deserve quick attention. Section 107.022 discusses prohibited appointments.

TEX. FAM. CODE § 107.022. The appointment of counsel to indigent parents in private termination proceedings is not among the prohibited appointments. TEX. FAM. CODE § 107.022. Section 107.023 is captioned "Fees in Suits Other than Suits by Governmental Entity." TEX. FAM. CODE § 107.023. This section appears to govern the payment of attorneys ad litem, guardians ad litem, or amicus attorneys for the child in private termination proceedings. TEX. FAM. CODE § 107.023. Once again, the statute expressly prohibits assessing awards against the "state, a state agency, or a political subdivision of the state." TEX. FAM. CODE § 107.023(c).

What Happened in Tarrant County

Ms. Rhine filed a pro se answer and cross-petition. (CR 23-27.) No one would be taking a default judgment against her. Ms. Rhine did not request the appointment of counsel. (CR 23-27.)

On July 30, 2006, Ms. Rhine wrote the trial court and requested the appointment of counsel because she was indigent. (CR 40.) This document is a letter to the trial court. It is not a motion. There is no request for a hearing. (CR 40-44.) The court of appeals also describes this document as "a letter to the trial court." *J.C.*, 250 S.W.3d at 488. In her "Brief on the Merits" before the Supreme Court of Texas, Ms. Rhine herself refers to the document as a letter to the court. (Tx. S. Ct. BOM, p. 3.) The docket sheet

does not show any hearing or any ruling on a request for appointed counsel for Ms. Rhine. (CR 58-59.)

The trial was on November 6, 2006. (CR 54, 58.) Here is an indication of reliability. The trial court heard evidence. The judgment was signed January 7, 2007. (CR 57.)

If the trial court, after hearing the evidence, concluded the Deatons were railroading Ms. Rhine, or if the trial court simply felt the appointment of counsel to Ms. Rhine would better develop the case, the trial court was free to grant a new trial on its own motion. Tex. R. Civ. P. 320. The trial court did not do that. Here is another indication of reliability.

Regarding the Possible Appointment of Appellate Counsel

On page 5 and 6 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals abated the appeal for an indigency hearing. (Pet. p. 5-6.) This is incorrect. The Fort Worth Court of Appeals structured its order so that indigency was already established in Ms. Rhine's favor but for the cost of the Reporter's Record. (CR Supp. 2.) The Fort Worth Court of Appeals abated the appeal to determine whether the trial court would appoint Ms. Rhine an appellate attorney in its discretion. (CR Supp. 2.) That is how the trial court understood the matter. (RR 3.) The trial court was aware the county could not pay for her attorney's fees. (RR 12.) The Deatons specifically

asked that they not have to finance her attorney's fees. (RR 10.)

Regarding the Reporter's Record

Regarding the lack of a free Reporter's Record, on pages 6 and 7 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals acknowledged but ignored this due process violation. (Pet. pp. 6-7.) The opposite is true. Far from ignoring the violation, the Fort Worth Court of Appeals pointed it out to Ms. Rhine. *J.C.*, 250 S.W.3d at 488 n.3. Ms. Rhine had already shown the ability to file a timely motion for new trial. (CR 60.) There was no reason to suspect she could not file a timely motion for rehearing. Tex. R. App. P. 49. This was the Fort Worth Court of Appeals' way of telling Ms. Rhine to file a motion for rehearing and regurgitate footnote three back to the court, and, one way or another, she would get a "free" Reporter's Record. Inexplicably Ms. Rhine did not file a motion for rehearing. The same pro se litigant who managed to file a timely motion for new trial in the trial court, who managed to timely perfect her appeal to the Fort Worth Court of Appeals, who managed to timely file her petition for review in the Supreme Court of Texas, and who boldly warned the trial judge she was taking this matter up to the Supreme Court (and succeeded) neglected to file a motion for rehearing alleging an error that guaranteed success. (RR 12.) Once again, the Deatons assert that if this case has no Reporter's Record, it is because Ms. Rhine does not want the courts to see it. Ironically, her case

has always been stronger without a Reporter's Record.

On page 14 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals should have corrected the error on its own and not required Ms. Rhine to complain. (Pet. p. 14.) The justices of the Fort Worth Court of Appeals do not represent the parties before them. Under the circumstances, after pointing the error out to Ms. Rhine, it was not too much to ask Ms. Rhine to make the complaint herself. She did not.

In the event the Court orders the preparation and filing of the Reporter's Record, the Deatons ask that the Court specify who has to pay for it. A ruling that Ms. Rhine is entitled to a free reporter's record means Ms. Rhine is entitled to a reporter's record at no charge to her; it does not mean the reporter's record is free. Someone will end up paying for it. Inasmuch as Ms. Rhine does not appear to be proceeding as an indigent in this Court, Ms. Rhine would appear to have some financial backing at this time and would appear to be able to pay for it. Additionally, to the extent possible, the Deatons would ask the Court to resolve any remaining issues here rather than remand the cause back to the court of appeals. *See, e.g., In re R.R.*, 209 S.W.3d 112, 115-16 (Tex. 2006) (because appeal accelerated, supreme court addressed certain issues rather than remand them back to court of appeals).

Final Comments

The Deatons do not begrudge Ms. Rhine having counsel or an appellate record. The Deatons have resisted having to pay for her counsel and for her appellate record.

The Deatons do not like the appointment statutes any more than Ms. Rhine does. This case started out as a government-initiated suit to terminate Ms. Rhine's parental rights. It was financed by public funds. It became a private termination proceeding financed exclusively by the Deatons. Prosecuting termination proceedings is not the role of foster parents. This asks far too much of foster parents. This case is Exhibit A for why the Texas legislature should change the laws regarding indigent parents in private termination proceedings. To the extent the Court is inclined to hear the case, the Deatons would hope the Court would read her complaints to encompass the prohibition of the use of state funds.

The Deatons contend Ms. Rhine has never had any hope of obtaining the return of her child and that her strategy has always been one of delay and prolongation. As a pro se litigant, she has succeeded exceptionally well in that respect. This case has been going on now for nearly five years – J.C.'s entire life – during which time J.C. has not spent even one day in Ms. Rhine's unsupervised care.

Ostensibly Ms. Rhine did not see her limitations, her instability, or the danger she posed to her own child. The Department saw them. The Department

removed J.C. The Deatons saw them. They were willing to try to intervene in the Dallas County case and file an original suit in Tarrant County. J.C.'s attorney ad litem saw them. The Tarrant County trial judge apparently saw them as well, because he was willing to terminate. Both Ms. Rhine and her child needed help. The Deatons were in a position to help only her child. The Department was in a position to help Ms. Rhine, but after a year and a half, it was still unwilling to return J.C. to her and effectively asked the Deatons to carry the ball once its own statutory deadline expired.

The solution is not to send the case back to the court of appeals to restart the appellate process. The solution is not to send the case back to the trial court for a new trial, after which new appeals will most certainly follow. Ms. Rhine has no chance of persuading a court to return her child to her. Despite that, Ms. Rhine has shown she will never stop fighting. This only introduces instability into J.C.'s life. Protracted litigation is not in J.C.'s best interest.

The solution is to go to the Texas legislature and get the Texas statutes changed. This case should give the Texas legislature plenty to think about. The relevant statutes placed the parties, the trial judges, and the appellate judges all in exceptionally awkward positions. There is now a rallying point from which to argue change.

Termination can mean a parent never sees her child again. It does not necessarily have to mean that.

Given the history and given Ms. Rhine's issues, the Deatons cannot promise anything. The Deatons are, however, not totally unsympathetic to Ms. Rhine. Frightened, yes. Totally unsympathetic, no.

The Attorney General of the State of Texas

In the event this Court grants the petition for writ of certiorari, the Deatons ask this Court to strongly encourage the Attorney General of the State of Texas to file an amicus brief on the merits. The Deatons certainly will. The validity of the statutes is really the State of Texas's fight. The State of Texas provided the statutory framework within which the Deatons, Ms. Rhine, the trial courts, the Fort Worth Court of Appeals, and the Supreme Court of Texas all had to work. The Deatons are loath to defend statutes with which they themselves are unhappy.

CONCLUSION

For all the foregoing reasons discussed above, the "Petition for Writ of Certiorari" should be denied.

Respectfully submitted,

DEAN M. SWANDA
SWANDA & SWANDA, P.C.
Attorneys at Law
109 E. Park Row Drive
Arlington, TX 76010

Telephone (817) 467-4668
Facsimile (817) 465-3779
TX Bar No. 19550620

Counsel for Respondents
Carl and Yolanda Deaton

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP, SUITE 9000
FORT WORTH, TEXAS 76196

tel: (817) 884-1900
fax: (817) 884-1932

www.2ndcoa.courts.state.tx.us

CHIEF JUSTICE
JOHN CAYCE

JUSTICES
TERRIE LIVINGSTON
LEE ANN DAUPHINOT
DIXON W. HOLMAN
ANNE GARDNER
SUE WALKER
BOB MCCOY

CLERK
STEPHANIE ROBINSON

CHIEF DEPUTY CLERK
DEBRA SPISAK

CHIEF STAFF ATTORNEY
JANETTE THOMPSON

April 17, 2007

Tracy Rhine
[Home Address Omitted]
Dallas, TX 75287

RE: Court of Appeals Number: 02-07-00081-CV
Trial Court Case Number: 324-397088-06

Style: In the Interest of J.C., A Child

The court reporter responsible for preparing the reporter's record in this appeal has informed this

court that payment arrangements and designation have not been made for the reporter's record. *See* TEX. R. APP. P. 34.6(b)(1), 35.3(b)(2), (3).

Unless, by **May 02, 2007**, you make payment arrangements and designate to the court reporter **and provide this court with proof of payment and designation**, the court may consider and decide those issues or points that do not require a reporter's record for a decision. *See* TEX. R. APP. P. 37.3(c).

Respectfully yours,

STEPHANIE ROBINSON, CLERK

/s/ Meagan Z. Polk

By: Meagan Z. Polk, Deputy Clerk

CC:

Kellye A. Swanda
Swanda & Swanda, P.C.
109 E. Park Row Dr.
Arlington, TX 76010

Duke Hooten
Appellate Attorney
DFPS MC: E-611
701 W. 51st Street
Austin, TX 78751

Kee A. Ables
Attorney at Law
675 N. Henderson, Ste. 300
Fort Worth, TX 76107

Court Reporter, 324th District Court
Tarrant County Family Law Center
200 E. Weatherford St.
Fort Worth, TX 76196